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IN THE SUPREME COURT
OF
THE UNITED STATES OF AMERICA

OCTOBER TERM 1991

GEORGE LEWIS BAILES, JR.,
PETITIONER,
VS.
UNITES STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. WHETHER A CONGRESSIONAL STATUTE THAT IS SILENT AS TO CONGRESSIONAL INTENT FOR ITS RETROACTIVE APPLICATION SHOULD BE PRESUMED TO HAVE RETROACTIVE EFFECT.

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The opinions and orders rendered by the Federal District Court for the Northern District of Alabama, and by the United States Court of Appeals for the Eleventh Circuit, are reproduced and contained within the appendix attached hereto and made a part of this petition.

STATEMENT OF JURISDICTION

1. Date of entry of the judgment or decree sought to be reviewed: September 30, 1991.

2. Date of any order respecting a rehearing and date of any order and the date and terms of any order granting an extension of time within which to file the petition for a writ of certiorari: December 6, 1991.

3. The Judgment of the United States Court of Appeals for the Eleventh Circuit was rendered on September 30, 1991. A suggestion for Rehearing En Banc was timely filed and denied on December 6, 1991, and this petition for certiorari was filed within 90 days from September 30, 1991. This Court's jurisdiction is invoked under the provisions of 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

Title 12 U.S.C 1715z-4a. Double Damages for unauthorized use of multifamily housing project assets and income

(a) Action to recover assets or income

(1) The Secretary of Housing and Urban Development (referred to in this section as "Secretary") may request the Attorney General to bring an action in a United States district court to recover any assets or income used by any person in violation of (A) a regulatory agreement that applies to a multifamily project whose mortgage is insured or held by the Secretary under Title II of the National Housing Act [section 1707 et seq. of this title]; or (B) any applicable regulation. For purposes of this section, a use of assets or income in violation of the regulatory agreement or any application regulation shall include any use for which the documentation in the books and accounts does not establish that the use was made for a reasonable operating expense or necessary repair of the project and has not been maintained in accordance with the requirements of the Secretary and in reasonable condition for proper audit.

(2) For purposes of a mortgage insured or held by the Secretary under Title II of the National Housing Act [12 U.S.C.A. § 1707 et seq.], the term "any person" shall mean any person or entity which owns a project, as identified in the regulatory agreement, including but not limited to any stockholder holding 25 percent or more interest of a corporation that owns the project; any beneficial owner under any business or trust; any officer, director, or partner of an entity owning the project; and any heir, assignee, successor in interest, or agent of any owner.

(b) Initiation of proceedings and temporary relief

The Attorney General, upon request of the Secretary, shall have the exclusive authority to authorize the initiation of proceedings under this section. Pending final resolution of any action under this section, the court may grant appropriate temporary or preliminary relief, including restraining orders, injunctions, and acceptance of satisfactory performance bonds, to protect the interests of the Secretary and to prevent use of assets or income in violation of the regulatory agreement and applicable regulation and to prevent loss of value of the realty and personalty involved.

(c) Amounts recoverable

In any judgment favorable to the United States entered under this section, the Attorney General may recover double the value of the assets and income of the project that the court determines to have been used in violation of the regulatory agreement or any applicable regulation, plus all costs relating to the action, including but not limited to reasonable attorney and auditing fees. Notwithstanding any other provision of law, the Secretary may apply the recovery, or any portion of the recovery, to the project or to the applicable insurance fund under the National Housing Act [12 U.S.C.A. § 1701 et seq.]

(d) Time limitation

Notwithstanding any other statute of limitations, the Secretary may request the Attorney General to bring an action under this section at any time up to and including 6 years after the latest date that the Secretary discovers any use of project assets and income in violation of the regulatory agreement or any applicable regulation.

(e) Continued availability of other remedies

The remedy provided by this section is in addition to any other remedies available to the Secretary or the United States.

STATEMENT OF THE CASE

Starting in October, 1979, through February, 1981, the Petitioner secured several loans for the purpose of constructing multifamily housing units, which loans were insured against default by the Secretary of Housing and Urban Development (HUD) pursuant to Section 221(d)(4) of the National Housing Act, 12 U.S.C. 1715l(d)(4).

Each of the aforementioned loans were accompanied by a regulatory agreement with HUD, which provided that income must be used for normal operating expense and necessary repairs, unless, inter alia, the projects had surplus cash as defined in paragraph 16(f) of the agreements. These agreements further provided that in the event of violation by the borrower, HUD may seek relief in any court, either state or federal, for an injunction or other relief for a violation of said agreement.

HUD's Office of Inspector General (OGI) in August, 1986, issued an audit report asserting that certain monies had not been expended within the guidelines as prescribed by the regulatory agreement. On May 14,

1987, HUD issued a notice of proposed disbarment to George L. Bailes, Jr., upon which, hearing was held in November of 1988. After hearing the evidence, the administrative judge entered an order of disbarment.

On May 5, 1989, the United States of America, filed a complaint seeking double damages under 12 U.S.C. 1715z-4a(c), a statute not even in existence at the time of the complained of expenditures. On June 6, 1989, the United States of America filed a motion for summary judgment and memorandum in support thereof. The United States contended that Bailes was collaterally estopped from relitigating the findings of the administrative judge.

Bailes filed an affidavit in response to the motion for summary judgment, expressly disputing the issue that the funds were improperly disbursed. The District Court entered an order and opinion on July 12, 1989, granting summary judgment to the United States, and applied 12 U.S.C.1715z-4a(c) retroactively, awarding double damages with leave to prove attorney fees and costs as provided by the newly enacted statute.

After a variety of post judgment matters, George L. Bailes, Jr., filed a notice of appeal on November 9,

1989. On September 30, 1991, the Eleventh Circuit Court of Appeals affirmed the judgment of the District Court, agreeing that Bradley v. School Board of Richmond, 416 U.S. 696 (1974) mandated retroactive application of the statute. On December 6, 1991, the Suggestion of Rehearing En Banc was denied, and hence, this petition.

ARGUMENT

A STATUTE THAT IS SILENT AS TO CONGRESSIONAL INTENT FOR ITS RETROACTIVE APPLICATION SHOULD NOT BE PRESUMED TO APPLY RETROACTIVELY.

This Court has recognized an apparent tension between the rule of presumed statutory retroactivity announced in Bradley v. School Board of Richmond, 416 U.S. 696 (1974) and the rule of presumed statutory prospectivity announced in Bowen v. Georgetown University Hospital, 488 U.S. 204. In Kaiser Aluminum v. Bonjorno, 110 S.Ct. 1570 (1990), this Court stated:

"We need not in this case, however, reconcile the two lines of precedent represented by Bradley, supra, and Georgetown, supra, because under either view, where the congressional intent is clear, it governs." Id. at 1577.

The instant case presents this Court with the opportunity not available in Kaiser, to wit: resolution of the issue of the presumption of statutory retroactivity in an instance where Congressional intent is silent.

The Court below recognized that the "text and legislative history of section 1715z-4a(c) are silent on this issue [of retrospective or prospective application]". U.S. v. Peppertree Apartments, 942 F2d 1555, 1561, (11th Cir. 1991). In light of this finding, the Court indulged the Bradley presumption that "a court is to apply the law in effect at the time that it renders a decision," Id., and decided that the Circuit was "bound by precedent to apply Bradley," unless otherwise directed by this Court. See Id. at fn. 3.

The Eleventh Circuit stands virtually alone among its companion Circuits by declaring Bradley to govern in situations of undiscernible legislative intent. The Seventh Circuit has recognized that the facts of one case dictate application of the Bradley presumption. See FDIC v. Wright, 942 F2d 1089, 1095, n.6 (7th Cir. 1991). But see Orrego v. 833 West Buena Joint Venture, 943 F2d 730, 734-35 (7th Cir. 1991) (holding that Georgetown prohibits administrative agencies from promulgating retroactive rules).

The First Circuit has seemingly charted a new course on the issue by declaring: "...[T]he touchstone

for deciding the question of retroactivity is whether retroactive application of a newly announced principal would alter substantive rules of conduct and disappoint private expectations." See C.E.K. Industrial Mechanical Contractors v. N.L.R.B, 921 F2d 350, 358 fn.7 (1st Cir. 1990).

But the remainder of the Circuits that have addressed the issue, have in one fashion or another, assumed that this Court's decision in Bowen controls when there is Legislative silence on retroactivity. The Second Circuit has followed the rule in Bowen: "Even where some substantial justification for retroactive application...is presented, courts should be reluctant to find such authority...absent an express statutory grant." (citing Bowen.) See Lehman v. Burnley, 866 F2d 33 (2nd Cir. 1989). The Fourth Circuit has likewise followed the rule in Bowen, See Leland v. Federal Ins. Adm'r., 934 F2nd 524, at 527 (4th Cir. 1991), as has the D.C. Circuit; see Wagner Seed Company v. Bush, 946 F2d 918, at 924 (D.C. Cir. 1991).

Three additional Circuits have squarely confronted the apparent strain between the two lines of cases, and

resolved the confrontation in favor of Bowen. In Simmons v. Lockhart, 931 F2d 1226, (8th Cir. 1991), the Eighth Circuit recognized and decided: "...one must choose between the Bradley and Georgetown Hospital presumptions. The better rule is that of Georgetown Hospital: we will not retroactively apply statutes or regulations without a clear indication that the legislature or administrative agency intends to diverge from the norm of acting prospectively." Id. at 1230. In like fashion, the Tenth Circuit met the two lines of cases head on: "Forced to elect between these contradictory presumptions, we choose Bowen. We find that the Bowen line of cases is well entrenched in the history of Supreme Court jurisprudence, whereas Bradley is largely unsupported by its cited authorities." DeVargas v. Mason, et al., 911 F2d 1377, at 1389 (10th Cir. 1990).

The third of the three Circuits that has squarely addressed the two lines of cases, resolving the conflict in favor of Bowen, recognizes a limited role that Bradley should play: "...Bradley expresses no presumption of statutory retroactivity; rather, it binds courts, with some exceptions, to apply legislation enacted while

cases are pending decision, not those already decided, or those, as here, that may evade decision completely." Walker v. U.S. Dept. of Housing and Urban Development, 912 F2d 819, at 831 (5th Cir. 1990).

Finally, the Ninth Circuit managed to elicit the rule of prospectivity without the assistance of Bowen, but by relying on past precedent of this Court antedating both Bowen and Bradley, "As a general rule, legislative enactments, including constitutional amendments, apply only prospectively." (citing Bruner v. U.S., 343 U.S. 112, 117 (1952)).

The Eleventh Circuit is still wed to the concept of Bradley, even though there is authority within the Eleventh Circuit itself to the contrary. In Wright v. Director of FEMA, 913 F2d 1566 (11th Cir. 1990), the Eleventh Circuit recognized: "The principal affirmed in Bradley has generated some confusion in the Federal Courts, since it appears to conflict with the aforementioned long standing rule of statutory construction restated in Bowen, that favors the prospective application of statutes and regulations." (citations omitted.)

As shown from the above survey of Circuits, perhaps the most confusion visited upon the Federal

Courts because of the opposing principles has been within the Eleventh Circuit itself. Despite authority from this Court, and from authority from other Federal Circuits, the Eleventh Circuit will not divorce itself from the rule of Bradley, unless this Court so decrees.

The question at Bar has been addressed by several Circuits. The Second, Fourth, Fifth, Eighth, Ninth, Tenth, and D.C. Circuits have followed the long accepted rule of prospective application. However, the Eleventh Circuit seems to be the only true "Bradley Circuit" left in the Federal system, though to a lesser extent the Seventh Circuit also has followed Bradley. The First Circuit appears to have its own rule. This Court has the opportunity to either set the Eleventh Circuit, Seventh Circuit and First Circuit on the proper path, or to correct the seven other Circuits that have strayed.

Lastly, the problems that Peppertree has generated becomes obvious in the context of the retroactive application of the 1991 Civil Rights Act. At least one Judge of the Federal District Court for the Northern District of Alabama has noted:

"Fresh from it's victory in Peppertree, the same United States which there fought for and obtained retroactive

application of a statute doubling the damages to be paid by a violator, filed a brief in Van Meter v. Barr, Civil Action No. 91-0027 (GAG), in the United States District Court for the District of Columbia, stating at considerable length the Department of Justice's position, entirely inconsistent with the exemplary victory it won in Peppertree, that no provision of the Civil Rights Act of 1991 applies to any case pending prior to November 21, 1991." See King v. Shelby Medical Center, 91-AR-2258-S, memorandum opinion entered Dec. 18, 1991, Northern District of Alabama, Southern Division.

CONCLUSION

The writ of certiorari should issue to correct and clarify the expressly unresolved issue raised by this Court in Kaiser, concerning the presumption of statutory retroactivity or prospectivity. This Court's decision can then clarify to all of the Circuits the proper presumption, and afford uniformity where conflict now exists.

Respectfully Submitted,

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APPENDICES

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

PEPPERTREE APARTMENTS,
City Court II Apartments,
et al., Defendants,

George Bailes Jr., Defendant-Appellant.

No. 89-7850.

United States Court of Appeals,
Eleventh Circuit.

September 30, 1991.

Appeal from the United States District Court for the Northern District of Alabama.

Before BIRCH, Circuit Judge, DYER, Senior Circuit Judge and MOYE[1] , Senior District Judge.

BIRCH, Circuit Judge:

Appellants George Bailes, Jr. ("Bailes"), Bailes Realty Company, Peppertree Apartments, City Court

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1* Honorable Charles A. Moye, Jr., Senior U.S. District Judge for the Northern District of Georgia, sitting by designation.

II, Rainbow Apartments Company, and College Manor Ltd. appeal from an order of the United States District Court for the Northern District of Alabama. We agree with the district court's decisions to apply collateral estoppel to the findings of the administrative law judge, grant the motion of the United States for summary judgment, and award the United States damages in the amount provided by 12 U.S.C. section 1715z-4a(c). Accordingly, we AFFIRM the district court's order.

I. BACKGROUND

A. Factual Background

Peppertree Apartments, City Court II Apartments, Rainbow Apartments, and College Manor Apartments are multifamily housing projects located in Alabama. Each of the projects was built with the proceeds of a loan which was insured against default by the Secretary of Housing and Urban Development ("HUD") under authority granted by 12 U.S.C. section 1715l(b). HUD provides such mortgage insurance "to assist private industry in providing housing for low and moderate income families and displaced families." 12 U.S.C. section 1715l(a).

Each of these four housing projects is owned by a separate partnership entity. However, Bailes is a managing or general partner in each of the entities. At all times relevant to this action, Bailes Realty Company, of which Bailes is the sole owner, was the managing agent for the bank accounts of each of the projects.

In consideration for the mortgage insurance provided by HUD, each of the housing projects entered into an identical regulatory agreement with HUD. Each of the agreements was signed by Bailes, on behalf of the project owners, as managing partner, or general partner. The agreements prohibit project owners from using project income or other assets for any purpose other than "reasonable operating expenses and necessary repairs" without the prior written approval of HUD. R1-4-Ex.A 8(b). The agreements further provide that the expenditure of project funds that the expenditure of project funds is prohibited unless the project has "surplus cash" and certain other conditions are met. R1-4-Ex.A 8(e). In the event the project owners violate any provision of these agreements, the agreements provide that HUD may

[a]pply to any court, State or Federal, for specific performance of this Agreement, for an injunction against any violation of this Agreement, for the appointment of an receiver to take over and operate the project in accordance with the terms of the Agreement, or for such other relief as may be appropriate, since the injury to [HUD] arising from a default under any of the terms of this Agreement would be irreparable and the amount of damage would be difficult to ascertain.

R1-4-Ex.A 14(d).

B. Procedural Background

Claiming that Bailes had made expenditures in violation of the regulatory agreements, HUD determined that Bailes should be debarred from participation in HUD programs for a period of five years. After receiving notice of his proposed debarment, Bailes requested a hearing before HUD's Board of Contract Appeals. An Administrative judge of HUD's Board of Contract Appeals conducted a quasi-judicial proceeding, including an evidentiary hearing, after which she ruled from the bench. The administrative

judge found that Bailes had made a net distribution of $90,311 in project funds to money market accounts in his name and that he had not replaced that money despite knowing that those distributions violated the regulatory agreements. The administrative judge further found that as of the date of the hearing Bailes had not accounted for or repaid interest earned on these money market accounts. Accordingly, Bailes and his affiliate, Bailes Realty Company, were debarred from participation in HUD programs for five years.

The United States filed suit in the district court, seeking to recover from Bailes and the other project owners the $90,311 that had not been returned to the projects' accounts as well as statutory damages. The United States the filed a motion for summary judgment, contending that collateral estoppel barred the relitigation of issues raised in the administrative proceeding. The district court granted the government's motion for summary judgment, and awarded the government double damages and costs as authorized by 12 U.S.C. section 1715z-4a(c).

Bailes filed a motion in the district court, requesting that court reconsider the award of double damages.

Bailes noted that 12 U.S.C. section 1715z-4a(c), the authority pursuant to which the district court awarded double damages, was passed in 1987, while the violations of the regulatory agreements took place in 1985 and earlier. Bailes contended that this statutory provision for double damages was not to be applied retroactively. The district court disagreed, and denied Bailes's motion.

Bailes now challenges the district court's use of collateral estoppel, grant of summary judgment in favor of the United States and award of double damages.

II. DISCUSSION

A. Collateral Estoppel

[1,2] "'The doctrine of collateral estoppel precludes a party from relitigating an issue that was fully litigated in a previous action.'" Palciauskas v. United States, 939 F.2d 963 (11th Cir.1991) (quoting Deweese v. Town of Palm Beach, 688 F.2d 731, 733 (11th Cir.1982)). Collateral estoppel may prevent the relitigation in a judicial action of issues of fact previously decided in an administrative proceeding. Pantex Towing Corp. v. Glidewell, 763 F.2d 1241, 1245 (11th Cir.1985).

[W]hen an administrative body has acted in a judicial capacity and has issued a valid and final decision on disputed issues of fact properly before it, collateral estoppel will apply to preclude relitigation of fact issues only if: (1) there is identity of the parties or their privies; (2) there is identity of issues; (3) the parties had an adequate opportunity to litigate the issues in the administrative proceeding; (4) the issues to be estopped were actually litigated and determined in the administrative proceeding; and (5) the findings on the issues to be estopped were necessary to the administrative decision.

Id. The district court properly applied the doctrine of collateral estoppel to preclude the relitigation of the issues of fact determined by the administrative judge of HUD's Board of Contract Appeals.

1. Identity of the Parties

The first part of the Pantex Towing test clearly has been met. The parties involved in the administrative proceeding before HUD's Board of Contract Appeals were Bailes, Bailes Realty Company and the government. The parties to this action are Bailes,

Bailes Realty Company, the four housing projects, and the government. Bailes is a general partner of each of the partnership owners of the housing projects. Accordingly, the parties involved in this action are either the parties involved in the administrative action or the privies of Bailes, a party to the original action. Furthermore, the district court's order granting the government's motion for summary judgment and double damages provides that "the United States shall have and recover from George L. Bailes, Jr., the sum of ... $180,622 and costs." R1-9 (emphasis added). Thus, parties affected by the administrative proceeding and the events in the district court are the same.

2. Identity of the Issues

The issue addressed by both the administrative judge and the district court was whether Bailes distributed project funds in violation of the regulatory agreements. The complaint filed by HUD with the Board of Contract Appeals charged Bailes with making disbursements from project funds in violation of the regulatory agreements. R1-4-Ex.E-2 at 5. The administrative judge recognized that this was an issue at the

administrative hearing. R1-4-Ex.E-4 at 538 ("HUD charged as grounds for debarment, that George Bailes violated the Regulatory Agreement ... [by] making unallowable distribution[s] of project funds ..."). The claim filed by the United States in the district court alleged that the regulatory agreements had been violated by the prohibited disbursement of project funds. Thus, the factual issue to be addressed by the district court was the same issue previously before the administrative judge.

3. Adequate Opportunity

Bailes had an adequate opportunity to litigate the relevant issue in the administrative hearing, i.e., whether he disbursed project funds in violation of the regulatory agreements. The proceedings before the administrative judge were quasi-judicial in nature and included an evidentiary hearing. Furthermore, Bailes stipulated that numerous disbursements of project funds were made to money market accounts. Thus, Bailes had an adequate opportunity to litigate the issue of whether he distributed project funds in violation of the regulatory agreements.

4. Actually Litigated

The issue of whether Bailes disbursed project funds in violation of the regulatory agreements actually was litigated and determined in the administrative hearing. The administrative judge stated that "[t]he most serious charge [against Bailes] involves the movement of project operating funds into money market accounts where they were commingled with non-project monies in violation of the Regulatory Agreement." R1-4-Ex.E-4 at 550-51. The administrative judge then determined that more than $90,000 of that money had not been placed and that "interest earned by those project funds has not been accounted for or replaced." Id. at 551. She further described Bailes's transfer of project funds into money market accounts as "wholesale violations of ... the Regulatory Agreement." Id. Accordingly, the issue of whether Bailes violated the regulatory agreements clearly was litigated and determined in the administrative proceeding.

5. Necessary to the Administrative Decision

The administrative judge's determination that Bailes had disbursed project funds in violation of the

regulatory agreement was necessary to the administrative decision to debar Bailes from further participation in HUD programs for five years. The administrative judge found the charge against Bailes of wrongful disbursement of project funds to be the most serious charge against him. Id. at 552. Furthermore, the administrative judge stated that her decision to debar Bailes from further participation in HUD programs for five years was based on the financial violation of the regulatory agreements. Id. at 553, 554. Thus, the administrative judge's finding that Bailes had made unauthorized use of project funds was essential to her administrative decision.

The district court properly applied the five-part Pantex Towing test. Accordingly, the district court correctly determined that the doctrine of collateral estoppel precluded the relitigation of the factual issues before HUD's Board of Contract Appeals.

B. Summary Judgment

[3,4] When reviewing a district court's grant of a motion for summary judgment, we employ the standard applied by the district court when that court con-

sidered the motion. Martin v. Commercial Union Ins. Co., 935 F.2d 235, 238 (11th Cir.1991). Thus, we examine the evidence in the light most favorable to the non-moving party, and determine whether there exist any genuine issues of material fact which would preclude the grant of summary judgment. Id. As discussed above, the doctrine of collateral estoppel precluded the relitigation of factual issues determined by HUD's Board of Contract Appeals. The district court recognized that the administrative judge considered and resolved the material fact issues in this case:

> The Administrative Judge found that Bailes had made a net distribution of $90,311.00 to his money market accounts and that he had not replaced that money despite knowing that these distributions violated the regulatory agreements. The Administrative Judge also found that as of the date of the hearing Bailes had not accounted for or repaid interest earned on these accounts.

R1-8-2 (footnotes and citation omitted.) Thus, the district court properly granted the government's motion for summary judgment.

C. Retroactive Application of 12 U.S.C. section 1715z-4a(c)

[5] Pursuant to 12 U.S.C. section 1715z-4a(c),[2] the district court awarded the united States damages in the amount of $180,622 -- double the amount of project funds disbursed in violation of the regulatory agreements. Because Bailes's violations of the regulatory agreements occurred before section 1715z-4a(c) was enacted, Bailes contends that the district court should not have awarded the government double damages. We disagree.[3]

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2. Section 1715z-4a(c) provides:

> In any judgment favorable to the United States entered under this section [entitled "Double damages remedy for unauthorized use of multifamily housing project assets and income"], the Attorney General may recover double the value of the assets and income of the project that the court determines to have been used in violation of the regulatory agreement or any applicable regulation, plus costs relating to the action, including but not limited to reasonable attorney and auditing fees. Notwithstanding any other provision of law, the Secretary may apply the recovery, or any portion of the recovery, to the project or to the applicable insurance fund under the National Housing Act.

3. Bailes also claims that section 1715z-4a(c) does not apply to him because he is not a "person" within the meaning of that section. This claim is without merit. Section 1715z-4a(a)(2) defines "person" as any person or entity which owns a project, as identified by the regulatory agreement, including but not limited to any stockholder holding 25 percent or more interest of a corporation that owns the project;

[6,7] First, the change in section 1715z-4a(c) was remedial in nature. The statutory change provided that the government's remedy for the unauthorized use of housing project funds was the recovery of double damages, i.e., damages equal to double the value of the assets distributed in violation of the regulatory agreement. Statutory changes that are remedial in nature apply retroactively. Lussier v. Dugger, 904 F.2d 661, 665 (11th Cir.1990)(quoting United States v. Vanella, 619 F.2d 384, 386 (5th Cir.1980)); see also United States v. Fernandez-Toledo, 749 F.2d 703, 705 (11th Cir.1985)("[C]ases in this circuit have held that new statutes ... that affect only ... remedy will apply retroactively.").

[8] Second, "a court is to apply the law in effect at the time it renders its decision, unless doing so

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any beneficial owner under any business or trust; any officer, director, or partner of an entity owning the project; and any heir, assignee, successor in interest, or agent of any owner. Bailes was a partner of each of the partnerships owning the projects and the owner of Bailes Realty Company, the manager of each of the projects. He clearly is a "person" within the meaning of section 1715z-4a(a)(2).

would result in manifest injustice or there is statutory direction or legislative history to the contrary." Bradley v. School Board of Richmond, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974).[4] To determine whether retroactive application of section 1715z-4a(c) would result in manifest injustice, Bradley requires that we review three factors: "(a) the nature

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4. We recognize that there exists some confusion as to the applicability of this Bradley analysis. See Wright v. Director, Federal Emergency Management Agency, 913 F.2d 1566, 1573 (11th Cir.1990)("[T]he principle affirmed in Bradley has generated some confusion in the federal courts, since it appears to conflict with the...long-standing rule of statutory construction, restated in Bowen [v. Georgetown Univ. Hosp., 488 U.S. 204, 208, 109 S.Ct. 468, 471, 102 L.Ed.2d 493 (1988)], that favors the prospective application of statutes and regulations."). The Supreme Court has declined to clarify this confusion. See Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, —, 110 S.Ct. 1570, 1577, 108 L.Ed.2d 842 (1990)("We need not in this case ... reconcile the two lines of precedent represented by Bradley ... and [Bowen]..."). This circuit has relied upon the Bradley analysis to determine the retroactive application of statutory changes. See Federal Deposit Ins. Corp. v. 232, Inc., 920 F.2d 815, 818 n. 4(11th Cir.1991)(The court provided several examples of this circuit's utilization of the Bradley analysis.). Thus, unless otherwise directed by the United States Supreme court or the Eleventh Circuit en banc, we are bound by precedent to apply the Bradley analysis. See United States v. Thomas, 916 F.2d 647, 652 n. 6 (11th Cir.1990).

requires that we review three factors: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." Id. at 717, 94 S.Ct. at 2019. Our review of these factors leads us to the conclusion that manifest injustice would not result from the retroactive application of section 1715z-4a(c).

"The first consideration, the nature of the parties, arises from the distinction ... between private disputes and 'great national concerns.'" United States v. Marengo County Comm'n, 731 F.2d 1546, 1554 (11th Cir.1984). This case is not merely the result of a dispute between two private individuals. Rather, it involves HUD, an administrative agency of the federal government, and an issue of national concern, the utilization of private industry for the provision of housing for low and moderate income families and displaced families. Thus, consideration of the first Bradley factor supports the retroactive application of the double damages penalty of section 1715z-4a(c).

We next consider the nature of the parties' rights. "The Court has refused to apply an intervening change

to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional." Bradley, 416 U.S. at 720, 94 S.Ct. at 2020. Section 1715z-4a(c) does not affect any substantive right of Bailes. The change in the statute was remedial. As discussed above, the remedial nature of the statutory change supports the retroactive application of section 1715z-4a(c). Furthermore, the regulatory agreements provide that HUD may seek any "relief as may be appropriate." R1-4-Ex.A par. 14(d).

The third Bradley factor requires us to consider whether "a new and unanticipated obligation [][would be] imposed upon a party without notice or an opportunity to be heard." Bradley, 416 U.S. at 720, 94 S.Ct. at 2021. Section 1715z-4a(c) does not impose a new obligation upon Bailes. Instead, it imposes an additional remedy on already proscribed conduct. As stated by the district court, "[t]he statute imposed no new obligation; it merely reinforced an existing one." R1-14 at 3. Thus, after consideration of the factors set forth in Bradley, we determine that the application of

section 1715z-4a(c) to this case does not result in "manifest injustice."

Under Bradley, we also must determine from the statute itself and its legislative history whether Congress intended the statute to apply prospectively only. The text and legislative history of section 1715z-4a(c) are silent on this issue. Accordingly, we hold that the district court correctly held Bailes responsible for double damages as provided by section 1715z-4a(c).

AFFIRMED.

APPENDIX B

THE UNITED STATE COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-7850

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

PEPPERTREE APARTMENTS,
CITY COURT II APARTMENTS, et al.,
Defendants,

GEORGE BAILES, JR.,
Defendant-Appellant.

On Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, 942 F.2d 1555).

Before: BIRCH, Circuit Judge, DYER, Senior Circuit Judge and MOYE*, Senior District Judge.

PER CURIAM:

[X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rule of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

[ ] The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

[ ] A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

*Honorable Charles A. Moye, Jr., Senior U.S. District Judge for the Northern District of Georgia, sitting by designation.

Entered December 6, 1991.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division
Case No. 89-P-0794-S

THE UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
PEPPERTREE APARTMENTS; CITY)
COURT II; RAINBOW APARTMENTS)
COMPANY; COLLEGE MANOR LTD.;)
BAILES REALTY COMPANY; GEORGE)
L. BAILES, JR.,)
)
Defendants.

ORDER

Pursuant to the Opinion filed herewith, the court ORDERS as follows:

Defendants' motion to dismiss is DENIED.

Plaintiff's motion for summary judgment is GRANTED. The court FURTHER ORDERS that the United States shall have and recover from George L. Bailes, Jr., the sum of One Hundred Eighty Thousand Six Hundred Twenty-Two Dollars ($180,622.00) and costs. Any costs other than taxable costs shall be

determined under Northern District Rule 11 and not delay the finality of this judgment.

This the 12th day of July, 1989.

/S/ Sam Pointer
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division
Case No. 89-P-0794-S

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

PEPPERTREE APARTMENTS; CITY COURT II; RAINBOW APARTMENTS COMPANY; COLLEGE MANOR LTD.; BAILES REALTY COMPANY; GEORGE L. BAILES, JR.,

Defendants.

OPINION

The United States of America ("United States") brings this action pursuant to Section 221 of the National Housing Act, 12 U.S.C. section 1715(1), alleging defendants have taken and retained $90,311 from four housing projects in violation of this contractual obligations. Peppertree Apartments, City Court II Apartments, Rainbow Apartments, and College Manor Apartments are multifamily housing projects, each built with proceeds of a loan which is insured against default by the Secretary of Housing and Urban Development ("HUD"). Each of the projects is owned by a separate partnership entity.

George L. Bailes is a managing or general partner in each of these entities and is the sole owner of Bailes Realty Company which, at all times relevant to this action, was the managing agent for each of the projects' bank accounts. Each of the owners entered into an identical Regulatory Agréement contract with HUD. Among the provisions in this agreement was a provision which prohibited owners from using project rents and income for any purpose other that "reasonable operating expenses and necessary repairs." Para.8(b).[1] Among the remedies available should the owner violate the regulatory agreement is a provision that the government "may recover double the value of the assets and income of the project that [a] court determines to have been used in violation of the regulatory agreement. 12 U.S.C. 1715z-4a(c)." The government may also recover the reasonable costs it incurs in bringing the action, including reasonable attorney and auditing fees. Id.

---

1. Paragraph 8(e) provides that funds can be used for other purposes when the project has "surpluss cash" or when the owner has HUD's prior written approval for an otherwise unauthorized expenditure.

Defendants move to have this complaint dismissed, asserting that the sum made the basis of this suit were used for "the necessary and reasonable expenses incurred for operating the projects." (Bailes Affidavit). Plaintiff United States moves for summary judgment against the defendant. Plaintiff's motion is based on findings of an Administrative Judge of HUD's Board of Contract Appeals made after a quasi-judicial proceeding, including an evidentiary hearing, in which the issues now raised by the plaintiff in this case were fully adjudicated. (In the Matter of George L. Bailes, Jr., HUDBCA No. 88-3412-D27; Docket No. 88-1214-DB.) (Debarment Hearing held on November 1-4, 1988). The Administrative Judge found that Bailes had made a net distribution of $90,311.00 to his money market accounts[1] and that he had not replaced that money despite knowing that these distributions violated the regulatory agree-

1. The diversions totalled $1,519,711.00. Following an audit by HUD's Office of Inspector General, Bailes returned $1,414,800.00; following the administrative proceeding, Bailes returned an additional $14,600.00.

ments.[1] (Plaintiff's Exhibit E-4 at 541-543, 550-552). The Administrative Judge also found that as of the date of the hearing Bailes had not accounted for or repaid interest earned on these accounts. The United States now seeks to recover the amount that has not been returned to the projects, $90,311.00, and statutory damages.

Under the doctrine of collateral estoppel, the defendants may not relitigate the issues raised in the administrative proceeding and may not dispute the findings made by the Administrative Judge after the proceeding. Pantex Towing Corp. v. Glidewell, 763 F.2d 1241 (11th Cir. 1985). The court is of the opinion that these findings fully support the relief requested. Accordingly plaintiff's motion for summary judgment is due to be GRANTED. Defendants' motion to dismiss is due to be DENIED.

This the 12th day of July, 1989.

/S/ Sam Pointer

1. HUD's complaint alleged that Bailes had distributed $1,519,711.00 in project funds in violation of the Regulatory Agreements.

United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division
Case No. 89-P-0794-S

THE UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
PEPPERTREE APARTMENTS; CITY)
COURT II; RAINBOW APARTMENTS)
COMPANY; COLLEGE MANOR LTD.;)
BAILES REALTY COMPANY; GEORGE)
L. BAILES, JR.,)
)
Defendants.)

ORDER

For the reasons expressed in the accompanying opinion, the motion to reconsider of defendant George L. Bailes, Jr., is hereby DENIED, and the motion of plaintiff United States of America to dismiss the counterclaim is DENIED.

This the 10th day of October, 1989.

/S/ Sam Pointer
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division
Case No. 89-P-0794-S

THE UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
PEPPERTREE APARTMENTS; CITY)
COURT II; RAINBOW APARTMENTS)
COMPANY; COLLEGE MANOR LTD.;)
BAILES REALTY COMPANY; GEORGE)
L. BAILES, JR.,)
)
Defendants.)

OPINION

This case grows out of agreements between defendants and the Secretary of Housing and Urban Development (HUD), involving the construction by defendants of multifamily housing projects with loans insured by HUD. In return for the loan insurance, HUD restricted the rents which defendants could charge and the uses to which the defendants could put income from the projects. In this action, the United States charged that the defendants, in violation of the agreements, retained $90,311.00 from project rents and income. On July 12, 1989, this court granted summary judgment in favor of the

United States, and entered a judgment against defendant George L. Bailes, Jr., of $180,622.00, double the amount retained.

The case is now before the court on a motion by defendant Bailes to reconsider the award of double damages, as well as a motion by plaintiff United States of America to dismiss Bailes' counterclaim on jurisdictional grounds. This court concludes that the award of double damages was appropriate, and that the counterclaim is not to be dismissed.

2. Defendant's Motion to Reconsider

This court awarded double damages pursuant to 12 U.S.C. section 1715z-4a(c), which explicitly provides for such awards. Defendant points out that this section was passed in 1987, and that the defendants' violations of the agreements took place in 1985 and earlier. Defendant contends that the statutory provision for double damages ought not be applied retroactively. This court, however, disagrees.

The leading case in this area is Bradley v. Richmond School Board, 416 U.S. 696 (1974), in which

the Supreme Court discussed the retroactive effect of a statute authorizing awards of attorney's fees in certain cases. Bradley invoked "the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Id. at 711. While Bradley's holding focussed on appellate courts' application of newly passed statutes to pending cases, Bradley's analysis is equally applicable here.

There is no indication that Congress intended that 12 U.S.C. section 1715z-4a(c) should apply only prospectively. Nor do the statute's purposes imply such an intent. Accordingly, the statute is to be applied retroactively in this case, absent "manifest injustice." Of the three factors identified in Bradley as relevant to "manifest injustice"; all lead to the conclusion that retroactive application is appropriate here. First, this is not "a routine private lawsuit," 416 U.S. at 718. Like Bradley, this case involves a "great national concern." Id. at 719. Second, the statute in question does not affect a "matured or un-

conditional right" of the defendant, id. at 720. Third, the statute cannot be said to have imposed "new and unanticipated obligations" on the defendant "without notice or an opportunity to be heard." Id. The statute imposed on new obligation; it merely reinforced an existing one. If the defendant was relying on a scheme which threatened only single damages, that reliance was unjustified.

In short, the statute in question is to be applied retroactively, as are most statutes "that affect only procedure or remedy." United States v. Fernandez-Toledo, 749 F.2d 703, 705 (11th Cir. 1985). Accordingly, defendant's motion to reconsider is to be denied.

3. Plaintiff's Motion to Dismiss Counterclaim

The counterclaim charges that the United States wrongly denied the defendants rent increases and surplus cash from the housing projects. Each count is styled as a breach of contract claim. Defendants seek injunctive and declaratory relief, and monetary relief of more than two million dollars. The United States moves to dismiss the counterclaim, arguing that this court has no jurisdiction.

The United States directs this court's attention to 28 U.S.C. section 1346(a)(2), sometimes known as the Tucker Act. That section grants jurisdiction to the Claims Court over breach of contract claims against the United States. It also grants jurisdiction to the district court over contract claims not exceeding $10,000.00. This court knows of no statute which confers jurisdiction on the district courts for contract claims exceeding $10,000.00. Accordingly, the Claims Court's jurisdiction over such claims is exclusive, notwithstanding defendants' arguments that judicial economy supports a contrary rule.

Yet this court cannot, at this early stage, conclude that the counterclaim falls within that exclusive jurisdiction of the Claims Court. First, defendants seek, inter alia, non-monetary equitable relief. The Claims Court may not have the power to grant that relief. Bowen v. Massachusetts, 108 S.Ct 2722, 2737 (1988). Second, if the counterclaim is in substance, a request for judicial review of adverse action by an administrative agency, this court may have jurisdiction pursuant to 5 U.S.C. section 702 and 28 U.S.C. section 1331.

This court's jurisdiction under 5 U.S.C. section 702 and 28 U.S.C. section 1331 may extend even to the granting of the monetary relief which defendants seek. Bowen v. Massachusetts, supra, and Esch v. Yeutter, 876 F.2d 976 (D.C.Cir. 1989) hold that district courts can in certain cases order the United States to pay sums greater that $10,000, the Tucker Act notwithstanding. Though Bowen v. Massachusetts and Esch involved jurisdiction over complaints, their reasoning is equally applicable to counterclaims.

This court cannot yet determine whether it has jurisdiction over all or part of the counterclaim. Given that uncertainty, it is proper to retain jurisdiction until the substance of the claim can be determined. Accordingly, the motion by the United States to dismiss the counterclaim is to be denied, with the understanding that this court may at some time revisit the issue.

This the 10th day of October, 1989.

/S/ Sam Pointer
United States District Judge

APPENDIX E

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT
BOARD OF CONTRACT APPEALS
WASHINGTON, D. C.

GEORGE LEWIS BAILES, JR.,)
Respondent)HUDBAC NO.
)88-3412-D27
)
)DOCKET NO.
)88-1214-DB

(Transcipt excerpt, taken on November 4, 1988)

DECISION

The purpose of debarment is to assure the Government that it only does business with responsible contractors and grantees. Responsibility is a term of art in government contract law, and it means the integrity and honesty of a contractor, as much as his ability to perform a contract properly.

The test for the need for debarment is present responsibility. However, a finding of present lack of responsibility may be on past acts.

George Bailes, Jr. has been charged with serious repetitive and pervasive deficiencies in his

role as general partner and management agent for the four HUN projects. The most serious charge involves the movement of project operating funds into money market accounts where the were commingled with non-project monies in violation of the Regulatory Agreement. And over $90,000 has still not been replaced.

Mr. Bailes knew the money was not surplus cash. He is law trained and certainly understands the provisions of the various contracts he signed. I hold him to those contract provisions.

As he acknowledged in testimony, two wrongs don't make a right. Ant dispute over rental increases have no bearing and in no way justify or mitigate the wholesale violations of Paragraph 8 of the Regulatory Agreement.

Funds of the project were not handled by Mr. Bailey as a trustee should have handled funds, even if they were to his mind held in trust. They were, in fact, converted to the use of the partnerships to pay partnership debts. I find this outrageous, inexcusable and shocking in its disregard for the financial sanctity

of the projects as opposed to the financial sanctity of the partnerships and its partners.

It is conduct totally lacking in responsibility. It went on after it's after its allowability was brought to Mr. Bailey attention by his own CPA. Despite promises to repay, I find little actual performance of such promises to repay.

Paying $14,000 on a $115,000 bill, without taking interest due into consideration, is so insufficient to call the entire promise to repay into question.

Likewise, payment of notes and construction expenses are not allowed out of project operating funds. The agreements are clear on that fact. Any construction of development expenses not covered by escrow must be paid out of personal fund or surplus cash only. This was a clear violation of Paragraph 8 of the Regulatory Agreement, and I find that the disregard of that requirement showed a lack of responsibility, if it was due to negligence or a deliberate violation.

The other charges are less serious than this, but taken in their entirety form a pattern of stubborn-

ness, refusal to give heed to well-substantiated, documents and warranted requests and demands by HUN for replacement of project management. I do see improvements in these areas, but only after imposition of a Temporary Denial of Participation and a freezing of rent increases to obtain contract compliance.

Some of the deficiencies were not easy to solve, particularly at City Court II, and some were solved and corrected in due course, but the overall picture is of a contractor lacking responsibility in the overall refusal to comply.

The present attitude of Mr. Bailey, as he stated to me right here in this courtroom, on the most serious charges to me, standing alone, without considering any of the other charges, merits and, indeed, demands a five year sanction.

Taking into consideration the time for which calculation of those five years is to begin, I find the debarment of George L. Bailey, Jr. and his affiliate, Bailey Reality Company, is warranted and necessary, up to and including August 15, 1992. The financial

violations alone cause me to take this action. This is the end of my decision.

CERTIFICATE OF SERVICE

I Roy Manly West do hereby further certify that I have complied with the Supreme Court Rule 29.4. (a) by mailing a copy of this petition to Solicitor General, Department of Justice, Washington D.C. 20530 and I have served three copies of the attached petition upon the United States of America by placing three copies of same in the United States Mail properly addressed and first class postage prepaid to Linda S. Trippe Assistant U. S. Attorney 1800 5th Avenue North Suite 200, Birmingham, Alabama 35203 telephone number (205) 731-1785 on this the 26th day of December, 1991.

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(3)
FILED
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No. 91-1075

In the Supreme Court of the United States

OCTOBER TERM, 1991

GEORGE LEWIS BAILES, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
ROBERT S. GREENSPAN
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QUESTION PRESENTED

Whether the court of appeals correctly held that an amendment to the penalty provisions of the National Housing Act applied retroactively.

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1075

GEORGE LEWIS BAILES, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. AII-AXIX, is reported at 942 F.2d 1555. The pertinent opinion, Pet. App. CXXV-CXXIX, and order of the district court, Pet. App. CXXIII-CXXIV, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1991. A petition for rehearing was denied on December 6, 1991. Pet. App. BXX-BXXII. The petition for a writ of certiorari was filed on December 26, 1991.* The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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* The caption was subsequently corrected. The Solicitor General received notice of the correction on January 9, 1992.

STATEMENT

1. Peppertree Apartments, City Court II Apartments, Rainbow Apartments, and College Manor Apartments are multifamily housing projects located in Alabama. Each project was built with a loan insured against default by the Department of Housing and Urban Development (HUD) under 12 U.S.C. 1715*l*(b) (1988). Petitioner George Bailes is a managing or general partner in each of the entities that own the projects. At all relevant times, Bailes Realty Company, of which petitioner is the sole owner, was the managing agent for each of the projects. Pet. App. AIII-AIV.

In consideration for HUD's mortgage insurance, each of the housing projects entered into a regulatory agreement with HUD. Each of the agreements is identical. In part, the agreements prohibit project owners from using project income or other assets for any purpose other than "reasonable operating expenses and necessary repairs" without HUD's prior written approval. The agreements provide that in case of violations of the agreement HUD may sue in state or federal court to enforce the agreement or for other relief. Pet. App. AIV-AV.

After determining that petitioner had made expenditures in violation of the regulatory agreements, HUD sought petitioner's debarment from participation in HUD programs for a five-year period. Pet. App. AV. A hearing was conducted by an administrative judge of HUD's Board of Contract Appeals. The administrative judge found that petitioner had diverted project assets to his money market accounts in the amount of $1,519,711; that, after an audit by HUD's Office of Inspector General, petitioner had returned $1,414,800; and that after the administrative proceeding petitioner returned an additional $14,600. Pet. App. CXXVII & n.1. The

administrative judge further found that petitioner had made improper distributions of $90,311 in project funds to his money market accounts, and that petitioner did not replace this amount despite knowing that the distributions violated the regulatory agreements. Pet. App. CXXVII. Accordingly, petitioner was debarred from participation in HUD programs for five years. Pet. App. AV-AVI.

Petitioner was also subject to other sanctions. Originally, when petitioner had engaged in the conduct for which he was debarred, the Secretary was authorized to seek fines up to $5000 for each "willful" violation and up to three years imprisonment, or both. See 12 U.S.C. 1715z-4(b) (1982). *In addition*, as petitioner conceded below, Pet. C.A. Opening Br. 34, the Secretary could have supplemented the statutory remedies with a suit for compensatory damages for breach of the regulatory agreement. In 1988, however, three years after petitioner's violations of the regulatory agreement, Congress substituted a liquidated damages remedy for the criminal sanctions allowable under the prior statute. In place of the latter, Congress provided for recovery of "double damages" calculated on the basis of a specific formula consisting of "double the value of the assets and income of the project that the court determines to have been used in violation of the regulatory agreement or any applicable regulation" plus certain specified costs. 12 U.S.C. 1715z-4a(c) (1988).

2. In 1989, the United States filed suit in the district court, seeking to recover the statutory damages under the 1987 law—*i.e.*, twice $90,311, or $180,622. The district court granted the government's motion for summary judgment and awarded the government the statutory damages and costs as requested. Petitioner sought reconsideration of the statutory award, arguing that, because Section 1715z-4a(c) had been enacted after

petitioner's conduct had occurred, the statutory damages remedy should not be applied retroactively. Pet. App. DXXI-DXXXII.

The district court rejected petitioner's argument, Pet. App. DXXXI-DXXXIV, and the court of appeals affirmed, Pet. App. AII-AXIX. Applying the retroactivity analysis set forth in *Bradley* v. *School Board*, 416 U.S. 696 (1974), the court held that it would not be a "manifest injustice" to apply Section 1715z-4a(c) to petitioner's case. Pet. App. AXV-AXIX.

DISCUSSION

The United States has determined not to pursue its claim for relief for "double damages" under the new statute. Instead, the government will seek compensatory damages under a contract theory based on the regulatory agreement signed by the petitioner and the government before the new statute was signed into law. Because the government is no longer seeking relief under the new statute, that claim for relief—which is the sole basis for the petition for a writ of certiorari—is moot. See, *e.g.*, *Webster* v. *Reproductive Health Services*, 492 U.S. 490, 512-513 (1989); *Frank* v. *Minnesota Newspaper Ass'n*, 490 U.S. 225, 227 (1989). Accordingly, this Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to the court of appeals, directing the court of appeals to remand the case to the district court with directions (i) to vacate with prejudice only that aspect of the district court's award that represents the "doubling" of damages and (ii) to allow the government to seek additional recovery pursuant to its other claims for relief. See *Webster*, 492 U.S. at 512-513; *Frank*, 490 U.S. at 227.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings as set forth above.

Respectfully submitted.

KENNETH W. STARR
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Assistant Attorney General

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APRIL 1992

Supreme Court, U.S.
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No. 91-1075

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GEORGE LEWIS BAILES, JR.,

Petitioner,

v.

UNITED STATES

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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Second Amended Complaint 16, 19, 23

No. 91-1075

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GEORGE LEWIS BAILES, JR.,

Petitioner,

V.

UNITED STATES.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

INTEREST OF AMICUS*

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit corporation established to assist African Americans in securing their constitutional and civil

*The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk.

rights. LDF has on several occasions represented litigants in this Court seeking application of newly enacted legislation to pre-existing claims. *Bradley v. Richmond School Board*, 416 U.S. 696 (1974); *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969).

LDF currently represents a number of litigants, including Brenda Patterson,[1] who now seek application of the provisions of the 1991 Civil Rights Act to their pre-Act claims. In that litigation the question presented by petitioner is of substantial importance. In the Eleventh Circuit in the instant case the Department of Justice maintained that *Bradley* remains good law. The United States insisted below that *Bradley* requires application of new legislation to pending claims unless Congress has indicated a contrary intent or such application would be manifestly unjust. In litigation regarding the 1991 Civil Rights Act, however, the Department of Justice has filed briefs

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[1] *See Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

contending precisely the opposite -- that *Bradley* is bad law and that new legislation should be presumed inapplicable to pre-existing claims.

When Title VII was amended in 1972 to authorize civil actions against federal agencies, the Department of Justice argued in some cases that that legislation *did* apply to pre-Act claims, and simultaneously insisted in other cases that the legislation *did not* apply to pre-Act claims. In that era, as today, government attorneys advanced whichever view of the law worked to their advantage in any given lawsuit, indifferent to the conflict that was inevitably created by that tactic. Acting on petitions filed by LDF, this Court granted certiorari to assure that the same rule of law would apply to all cases. *Brown v. General Services Administration*, 425 U.S. 820, 824 n.4 (1976); *Place v. Weinberger*, 426 U.S. 932 (1976).

REASONS FOR GRANTING THE WRIT

I. There Is A Conflict Among the Circuits Regarding Whether Legislation Should Be Presumed Applicable to Pre-Act Claims

Until four years ago there was no controversy among the lower courts, or within this Court, regarding when new legislation should be applied to pre-Act claims. Since 1974 -- indeed for almost two centuries -- the federal courts had followed the rule articulated in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974):

> [A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

416 U.S. at 711.

> [W]e must reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature.

416 U.S. at 715. The lower courts experienced little difficulty or disagreement in applying *Bradley*.

In 1988, the seeds of confusion were sown by this Court's decision in *Bowen v. Georgetown University Hospital*,

488 U.S. 204 (1988). The question in *Bowen* was whether the Administrative Procedure Act authorized the promulgation of regulations which altered after the fact the substantive rights of an affected party. Although that issue was a relatively narrow one, the Court's opinion contained the two potentially more far reaching sentences:

> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires that result.

488 U.S. at 208.

Two years later, in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 108 L.Ed.2d 842 (1990), the majority opinion set out at length the "manifest injustice" standard in *Bradley*, but also noted the "apparent tension" between *Bradley* and the two sentences quoted above from *Bowen*. 108 L.Ed.2d at 854. Because it believed that the plain language of the statute in *Bonjorno* did not apply to the circumstances of that case, the majority concluded that it "need not in this case ... reconcile the two lines of precedent

represented in Bradley ... and [*Bowen v.*]*Georgetown*...." *Id.* Four members of the Court did address that "apparent conflict," declaring it "more apparent than real" and urging adherence to the holding in *Bradley*. 108 L.Ed.2d at 871 (White, J., dissenting). Justice Scalia, in a separate concurring opinion joined by no other member of the Court, argued that *Bradley* was inconsistent with *Bowen* and should be overruled. 108 L.Ed.2d at 856 - 867.

Bowen and *Bonjorno* have combined to wreak considerable conflict and confusion among the circuit courts. Since *Bonjorno* three circuits have unequivocally reaffirmed their adherence to *Bradley*. In the instant case the Eleventh Circuit held:

> We recognize that there exists some confusion as to the applicability of this *Bradley* analysis.... The Supreme Court has declined to clarify this confusion .... This circuit has relied upon the *Bradley* analysis to determine the retroactive application of statutory changes .... Thus, unless otherwise directed by the United States Supreme Court or the Eleventh Circuit en banc, we are bound by precedent to apply the *Bradley* analysis.

Petition App. A-xvi n.4.[2] On four occasions since *Bowen* the Eleventh Circuit has relied on *Bradley* in holding a new law applicable to a pre-existing claim.[3]

The Seventh Circuit also regards *Bradley* as good and controlling law, reasoning that the concerns expressed in *Bowen* are encompassed within the "manifest injustice" exception to *Bradley* itself:

> Despite the existence of an alternative line of precedent, we believe there is no prejudice in applying only *Bradley* and its progeny to the facts in this case. Any tension between the two lines of precedent is negated because, under *Bradley*, a statute will not be deemed to apply retroactively if it would threaten manifest injustice by disrupting vested rights.

Federal Deposit Ins. Corp. v. Wright, 942 F.2d 1089, 1095 n.6 (7th Cir. 1991), petition for writ of certiorari pending *sub*

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[2] The decision below is now officially reported sub nom. *United States v. Peppertree Apartments*, 942 F.2d 1555 (11th Cir. 1991).

[3] *United States v. Peppertree Apartments*; *Federal Deposit Ins. Corp. v. 232, Inc.*, 920 F.2d 815 (11th Cir. 1991); *Delmay v. Paine Webber*, 872 F.2d 356, 357-58 (11th Cir. 1989); *Campbell v. Dominick & Dominick, Inc.*, 872 F.2d 358, 360-61 (11th Cir. 1984).

nom. Wright v. Federal Deposit Insurance Corp., No. 91-1274.[4] On three occasions since *Bowen* the Seventh Circuit has relied on *Bradley* in holding a new law applicable to a pre-existing claim.[5]

Most recently the Ninth Circuit has reiterated that it continues to apply *Bradley*:

> Where, as here, there is no clear indication of congressional intent, and no "manifest injustice" will result, we conclude that retroactive application ... to pending cases is appropriate. See *Bradley*, 416 U.S. at 711 (court applies the law in effect at the time it renders its decision unless "there is a statutory direction or legislative history to the contrary").

Federal Deposit Ins. Corp. v. New Hampshire Insurance Co., 1991 U.S. App. LEXIS 30071 at *25-*26 (9th Cir. 1991). On six occasions since *Bowen* the Ninth Circuit has relied on

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[4] See also *United States v. Brebner*, 951 F.2d 1017, 1022 (9th Cir. 1991) ("[A] change in the law must be given [retroactive] effect *unless* there was clear indication that it was *not* to apply in pending cases.") (emphasis and bracketed material in original) (quoting *Bradley*.)

[5] *Federal Deposit Ins. Corp. v. Wright*; *Resolution Trust Corp. v. Lightfoot*, 938 F.2d 65, 67 (7th Cir. 1991); *Schalk v. Reilly*, 900 F.2d 1091, 1096-97 (7th Cir. 1990).

Bradley in holding a new law applicable to a pre-existing claim.[6]

On the other hand, in *DeVargas v. Mason & Hanger-Silas Mason Co. Inc.*, 911 F.2d 1377 (10th Cir. 1990), the court stated:

> [W]e simply cannot harmonize ... *Bradley* ... with *Bowen* .... [w]e agree with Justice Scalia's observation in [*Bonjorno*] that "... these two lines of cases are in irreconcilable contradiction." .... Forced to elect between these contradictory presumptions, we choose *Bowen* .... We are strongly persuaded by Justice Scalia's ... concurring opinion in [*Bonjorno*] .... Faced with a choice between ... *Bowen* ... and *Bradley* ... , we elect the presumption reflected in the more recent decision in *Bowen* ....

911 F.2d at 1390, 1392. An Eighth Circuit decision asserted:

> Our cases have noted the irreconcilable conflict in the Court's directions on this point

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[6] *Federal Deposit Ins. Corp. v. New Hampshire Insurance Co.*; *Gonzalez v. Aloha Airlines*, 940 F.2d 1312, 1316 (9th Cir. 1991); *Commonwealth of Northern Mariana Islands v. Kawano*, 917 F.2d 379, 381-82 (9th Cir. 1990); *In re Pacific Far East Lines*, 889 F.2d 242, 247 (9th Cir. 1989); *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528 (9th Cir. 1989); *Delta Computer Corp., v. Samsung Semiconductor & Telecommun-ications Co.*, 879 F.2d 662, 663-65 (9th Cir. 1989).

> .... [I]n *Kaiser Aluminum & Chemical Corp. v. Bonjorno*.... Justice Scalia criticized the Court for not seizing the opportunity to resolve the real and troubling tension between the *Bradley* and [*Bowen*] lines of precedent .... [O]ne must choose between the *Bradley* and [*Bowen v.*]*Georgetown Hospital* presumptions. The better rule is that of [*Bowen v.*]*Georgetown Hospital.*

Simmons v. Lockhart, 931 F.2d 1226, 1230 (8th Cir. 1991).

A decision in the District of Columbia Circuit commented:

> Recent Supreme Court cases ... have undercut the *Bradley* principle. These decisions appear to be reviving the older presumption *against* retroactively applying statutes .... Because the [*Bowen v.*] *Georgetown Hospital* rule seems more faithful to the older decisions ..., we rely on that rule here.

Alpo Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958, 963-64 n.6 (D.C.Cir. 1990) (Emphasis in original). And a decision in the Federal Circuit stated:

> There is an irreconcilable conflict between *Bowen* and *Bradley* .... We prefer the longer-standing rule that retroactivity is not presumed.

Sargisson v. United States, 913 F.2d 918, 922-23 (Fed. Cir. 1990.) In briefs filed in the circuit courts within the last month, the Department of Justice, with the approval of the

Solicitor General, has repeatedly characterized these circuits as rejecting *Bradley*,[7] referring to the endorsement of *Bradley* in the instant case with the signal "but see."[8]

Several circuits have struggled to fashion a standard that reconciles *Bradley* and *Bowen*. The First Circuit applies *Bradley* if "[n]o conduct on the part of either party would have differed if the statute had been in effect at the time of the ... incident," but applies *Bowen* if at least one of the

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[7] See, e.g. Brief for the United States as Amicus Curiae, *Davis v. Tri-State Mack Distributions*, Nos. 91-3574, 92-1123 (8th Cir.), p. 13 n.6:

> "Several ... courts of appeals have expressly chosen *Georgetown* over *Bradley*. *See Alpo Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 964 n.6 (D.C. Cir. 1990); *Sargisson v. United States*, 913 F.2d 918, 922-23 (Fed. Cir. 1990); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1392 (10th Cir. 1990), *cert. denied*, 111 S.Ct 799 (1991)."

Because the United States was not a party in *Davis*, the government's amicus brief required, and in fact did receive, the approval of the Solicitor General. The brief in *Davis* is dated March 1992. Brief, p. 20.

[8] Brief for the United States of America as Amicus Curiae, *Russell v. City of Houston*, No. 91-6029 (5th Cir.), p. 8 n.5.

parties acted in reliance on the earlier state of the law. *Demars v. First Service Bank For Sav.*, 907 F.2d 1237, 1240 (1st Cir. 1990). The Sixth Circuit applies *Bradley* to laws which are "merely remedial," but applies *Bowen* to statutes which alter "substantive rights and liabilities." *United States v. Murphy*, 937 F.2d 1032, 1037, 1038 (6th Cir. 1991). Decisions in the Fourth and Fifth Circuits cite both *Bradley* and *Bowen* without specifying expressly when each precedent is to be applied. *Walker v. U.S. Dept. of Housing and Urban Dev.*, 912 F.2d 819, 831 (5th Cir. 1990); *Leland v. Federal Ins. Adm'r*, 934 F.2d 524, 528 and n.7 (4th Cir. 1991).

In the court below, the United States contended and the Eleventh Circuit held that new statutes are to be applied to pre-Act claims, unless Congress has clearly directed otherwise or such application would result in "manifest injustice." Whether that is indeed the appropriate canon of construction, i.e. whether *Bradley* is still good law, is a question of great practical importance. Where Congress clearly requires or forbids application of a new law to pre-

Act claims congressional intent is determinative. But Congress frequently does not express its intent on this point. The applicability of a new statute to pre-Act claims thus often turns on which presumption the courts are to utilize: a presumption in favor of such application or a presumption against it. That is a question that could arise regarding virtually any of the hundreds of public laws enacted by Congress each year, and the lower courts have been required to invoke such a presumption in interpreting a large number of statutes involving a wide variety subject matter. A review of Shepard's Citations reveals that the lower courts have in fact relied on *Bradley* on more than 700 occasions. The inter-circuit conflict involved in this case thus concerns a legal issue of pervasive and continuing importance.

II. The United States Is Filing Conflicting Briefs In the Lower Courts, Some Supporting and Others Opposing A Presumption That New Legislation Is Applicable to Pre-Act Claims

In the years after *Bradley* the United States generally and quite frequently maintained in the lower courts that new legislation was presumptively applicable to pre-Act claims.

In 1988 this Court's decision in *Bowen* arguably provided a colorable basis for contending that the courts should utilize precisely the opposite presumption. The United States did not, however, make a principled decision whether to continue to adhere to *Bradley*, as it had in the past, or to repudiate *Bradley* and adopt the contrary rule advocated by Justice Scalia. Rather, government attorneys now enthusiastically support the *Bradley* rule in some cases, while simultaneously disavowing that rule in other litigation. We have lodged with the Clerk of the Court[9] samples of briefs filed by the United States since *Bowen*, some of which argue in favor of, and some of which argue against the rule in *Bradley*. All the briefs cited below were filed by the United States after *Bowen*, and all but one were filed after *Bonjorno*.

In the instant case, for example, the United States insisted, "*Bradley* creates a presumption that statutes will

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[9] For the convenience of the Court, we have lodged an original and nine copies of these sets of briefs.

apply retroactively ...."[10] But the government's position as to the correct presumption has varied from case to case. In briefs filed within the last three years government attorneys have argued:

> The general rule is that statutes are assumed to have only prospective effect unless Congress expressly states otherwise .... The heavy presumption against retroactive application of statutes has deep roots in our law.[11]

> A statute will be presumed to apply to cases pending at the time of its passage unless there is a "clear indication" that it is not to apply. *Bradley* ....[12]

> The general rule of statutory construction is that statutes are presumed to have only prospective effect unless Congress states otherwise.[13]

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[10] Brief of Appellee, *United States v. Peppertree Apartments*, No. 89-7850 (11th Cir.), p. 23.

[11] Brief for the United States as Amicus Curiae, *Davis v. Tri-State Mack Distributions*, Nos. 91-3574, 92-1123 (8th Cir.), pp. 7-8.

[12] Response of the United States to Defendants' Motion to Strike Claims for Damages and Penalties, *United States v. Rent America, Inc.*, No. 89-6188 PAINE (S.D. Fla.), p. 24.

[13] Supplemental Brief for Appellees, *Rowe v. Sullivan*, No. 91-4675 (5th Cir.), p. 12 (capitalization omitted).

> As .... *Bradley* make[s] clear, a statute will be assumed to apply to cases pending at the time of its passage unless there is a "clear indication" that it is not to apply.[14]
>
> Th[e] heavy presumption against retroactivity has deep roots in the law .... The presumption is very strong that a statute was not meant to act retrospectively ....[15]
>
> A fundamental principle of our jurisprudence is that a court will apply the law as it exists when rendering its decision.[16]
>
> In general, statutes are presumed to have only prospective effect unless Congress expressly states otherwise.... This heavy presumption against retroactive application of statutes is deep-rooted.[17]

Bradley and its progeny hold that, in the absence of

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[14] Memorandum of the United States In Opposition to Defendant's Motion to Dismiss, *United States v. Presidio Investments, Ltd.*, No. CIV-90-0063-TUC-ACM (D. Ariz.), p. 14.

[15] Defendant's Memorandum in Opposition to Plaintiff's Motion To File Second Amended Complaint, *Van Meter v. Barr*, Civil Action No. 91-0027 (GAG) (D.D.C.), pp. 6-7.

[16] Brief for Respondent, *Ayala-Chavez v. I.N.S.*, No. 91-70262 (9th Cir.), p. 19.

[17] Brief for the United States of America as Amicus Curiae, *Russell v. City of Houston*, No. 91-6029 (5th Cir.), pp. 6-7.

> clear legislative intent to the contrary, courts should apply the law in effect at the time of the decision.... Even if the legislative history were construed to be ambiguous, the *Bradley* presumption should control.[18]

These contradictory assertions would understandably tend to breed a certain degree of confusion in the lower courts.

The government has taken conflicting positions regarding the correctness and vitality of *Bradley*. In its brief in the instant case, the government referred to *Bradley* twenty-two times.[19] In other litigation, the United States has asserted that "*Bradley* correctly states the law," describing the holding of *Bradley* as "important,"[20] "well-

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[18]Brief of Plaintiff-Appellant Federal Deposit Insurance Corporation, *Federal Deposit Insurance Corp. v. Wright*, No. 90-2217 (7th Cir.), pp. 26-27.

[19]Brief of Appellee, *United States v. Peppertree Apartments*, No. 89-7850 (11th Cir.), pp. 23 (three references), 24 (two references), 25 (four references), 27 (two references), 28 (two references), 30 (three references), 33 (three references), 36 (three references).

[20]Reply Brief of the United States to Opposition Briefs, *United States v. Allied Corp.*, Civil No. C-83-5898 FMS (N.D. Cal.), p. 18.

established,"[21] "well-settled"[22] and a "time-honored principle."[23] In these cases, government attorneys repeatedly quote the holding in *Bradley* that

> a court is to apply the law in effect at the time it renders it decision, unless doing so would result in manifest injustice or there is legislative history to the contrary.[24]

Elsewhere, however, the United States has denigrated *Bradley* and the similar decision in *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969), as

> two exceptional Supreme Court decisions that conspicuously depart from the general and longstanding rule against retroactivity .... Nothing in the *Bradley* Court's reasoning compelled the conclusion that its broad language suggests .... ["]It is significant that *not a single one* of the earlier cases

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[21]Response of the United States to Defendants' Motion to Strike Claims For Damages and Penalties, *United States v. Rent America*, No. 89-6188-PAINE (S.D. Fla.), p. 23.

[22]*Id.* at 24.

[23]United States' Reply to Defendants' Oral Motion to Dismiss, *United States v. Cannon*, Civil Action No. 6:91-951-3K (D.S.C.), p. 4.

[24]See, e.g., *id.*, quoting *Bradley v. Richmond School Board*, 416 U.S. at 711.

> cited in *Thorpe* and *Bradley* ... even *purports* to be applying a presumption of retroactivity."[25]

Another recent government brief asserted:

> *Bradley*, as broadly construed, does not survive *Georgetown's* reaffirmation of the presumption against retroactivity.... The venerable lineage and recent affirmation of the *Georgetown* rule strongly suggest that the Supreme Court would conclude that that that rule would govern....[26]

Where the United States has decided to oppose application of a particular new statute to a pre-Act claim, it has repeatedly urged the lower courts to "chose[e] [*Bowen v.*]*Georgetown* over *Bradley*," insisting that "*Georgetown* is the better decision."[27]

The government has also taken contradictory

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[25]Defendant's Memorandum in Opposition to Plaintiff's Motion to File Second Amended Complaint, *Van Meter v. Barr*, Civil Action No. 91-0027 (GAG) (D.D.C.), pp. 14, 16 (emphasis in original) (quoting in part Justice Scalia's concurring opinion in *Bonjorno*).

[26]Brief for the United States of America as Amicus Curiae. *Russell v. City of Houston*, No. 91-6029 (5th Cir.), p. 4, 8.

[27]Brief for the United States as Amicus Curiae, *Davis v. Tri-State Mack Distributions*, Nos. 91-3574, 92-1123 (8th Cir.), p. 13 n.6.

positions regarding the significance of several decisions handed down by this Court after *Bradley* but before *Bowen*. For example, in the instant case petitioner argued in the Eleventh Circuit that a presumption against application of the new legislation was established by *Bennett v. New Jersey*, 470 U.S. 632 (1985). The United States dismissed that contention out of hand:

> The case of *Bennett v. New Jersey* ..., cited by Bailes ... adds nothing to this discussion.... *Bennett* involved a substantive change in an existing statute rather than the creation of a new remedy.... That distinction alone makes *Bennett* irrelevant to the facts here.[28]

Elsewhere, in opposing application of another law that would have augmented the remedy available to prevailing plaintiffs, the United States asserted "the case falls under the traditional rule of nonretroactivity as reaffirmed in *Bennett*...."[29] Similarly, in opposing application of another

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[28]Brief of Appellee, *United States v. Peppertree Apartments*, No. 89-7850 (11th Cir.), p. 31.

[29]Brief for the United States as Amicus Curiae, *Davis v. Tri-State Mack Distributions*, Nos. 91-3574, 92-1123 (8th Cir.), p. 12.

remedial statute, the Department of Justice cited *United States v. Security Industrial Bank*, 459 U.S. 70 (1982):

> "The principle that statutes operate only prospectively ... is familiar to every law student." *United States v. Security Indus. Bank....*[30]

But in yet another recent brief, the Department of Justice took precisely the opposite position regarding the significance of that decision:

> *Security Industrial Bank* ... held that a statute that affects vested property rights will not be given retroactive application. It distinguished its situation from cases where the new statute affects only procedural changes or changes in the form of legal remedy.... Thus, *Security Industrial Bank* is inapposite.[31]

In the court below the Department of Justice insisted in particular, as it had in other cases, that applicability to pre-Act claims was to be presumed where a new law merely altered the remedies or procedure for enforcing a pre-

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[30]Supplemental Brief for the Appellees, *Rowe v. Sullivan*, No. 91-4675 (5th Cir.), p. 13.

[31]Reply of United States to Opposition Briefs, *United States v. Allied Corporation*, Civil No. C-83-5898 FMS (N.D. Cal.), p. 19.

existing right:

> [T]he general rule [is] that "changes relating only to procedure or remedy are usually held immediately applicable to pending cases." .... This is because there is no matured right to *any* particular remedy.[32]

Elsewhere the Department of Justice took the opposite position:

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[32]Brief of Appellee, *United States v. Peppertree Apartments*, No. 89-7850 (11th Cir.), p. 31 (emphasis in original) (citations omitted); *see* also Memorandum of the United States in Opposition to Motion to Dismiss, *United States v. Presidio Investments, Ltd.*, CIV-90-0063-TUC-AM (D. Ariz.), p. 14:

> The 1988 Amendments ... do not create new legal duties or responsibilities. Rather they merely provide a new process by which aggrieved persons may enforce existing rights.... Because the new remedies and enforcement procedures do not affect vested rights, retroactive application is entirely appropriate.

United States' Reply to Defendants' Oral Motion to Dismiss, *United States v. Cannon*, Civil Action No. 6: 91-951-3K, p. 8 ("defendants have no 'right' to avoid new penalties or administrative procedures for conduct that was unlawful at the time it occurred.")

> [T]he supposed substance-procedure distinction is not clearly established.... [A]ny distinction between new substantive and procedural rules would be illusory.[33]

In the court below the Department of Justice insisted that the new double damages statute in this case, which resulted in an additional damage award of over $90,000, ought to be imposed for a pre-Act violation of existing law:

> [T]he double damages remedy does not alter or diminish defendants' substantial rights. [The law] does not prohibit conduct that was previously permitted ... nor does it impose any additional duties...; it merely increases the measure of damages that result from violation of defendants' obligations.[34]

A few weeks after rehearing was denied in this case, however, the Department opposed application of another

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[33]Defendant's Memorandum in Opposition to Plaintiff's Motion to File Second Amended Complaint, *Van Meter v. Barr*, Civil Action No. 91-0027 (GAG) (D.D.C.), pp. 19-20.

[34]Brief of Appellee, *United States v. Peppertree Apartments*, No. 89-7850 (11th Cir.), p. 33.

law that would, if applicable, have resulted in an additional award of a mere $1600 for expert witness fees:[35]

> People take actions based on expectations formed by existing law.... In the present case, ... the ... Act exposes defendants to a new and unexpected liability. To apply the new expert fee provision ... to this case would plainly constitute retroactive application by defeating the defendant's legitimate expectations.[36]

This argument is the precise opposite of the government's stated position in the instant case. Here the government contended below that a defendant who has violated federal law cannot assert that it has and should be protected in a legitimate expectation that the violation will be inexpensive, and the remedy inadequate.

The government's contradictory positions on the merits of this issue have led it to offer inconsistent descriptions of the state of the law in particular circuits. For

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[35]Brief of Appellant Tri-State Mack Distributions, Inc., *Tri-State Mack Distributions, Inc. v. Davis*, No. 92-1123 EALR (8th Cir.), p. 8.

[36]Brief for the United States as Amicus Curiae, *Davis v. Tri-State Mack Distributions*, Nos. 91-3574, 91-1123 (8th Cir.), pp. 8-11.

example, in its briefs in the instant case, the Department of Justice insisted Eleventh Circuit caselaw established a presumption that new laws apply to pre-Act claims, citing three Eleventh Circuit cases.[37] In September 1991, the Department obtained from the Eleventh Circuit in this case a resounding endorsement of that rule and *Bradley*. Five months later, in another case, the Department of Justice insisted there was no clear Eleventh Circuit precedent on this issue:

> Two circuit courts ... have decided cases that they found would have come out the same way under *Georgetown* or *Bradley*, and expressed no preference between them.... *Wright v. Director, FEMA*, 913 F.2d 1566, 1573 (11th Cir. 1990)....[38]

It would be somewhat surprising if none of the Justice

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[37]Brief of Appellee, *United States v. Peppertree Apartments*, No. 89-7850 (11th Cir.), pp. 23, 31 (citing *United States v. Schumann*, 861 F.2d 1234 (11th Cir. 1988); *National Wildlife v. Marsh*, 747 F.2d 616 (11th Cir. 1984); and *United States v. Fernandez-Toledo*, 749 F.2d 703 (11th Cir. 1985)).

[38]Reply Brief for Appellant, *Reynolds v. Martin*, No. 91-15237 (9th Cir.), p. 17 n.6.

Department attorneys who signed or approved this later brief had any knowledge of the decision won earlier by the Justice Department in the instant case. In recent litigation within the Ninth Circuit, the government filed two briefs insisting that that Circuit follows *Bradley*,[39] won in

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[39]Brief for Respondent, *Ayala-Chavez v. I.N.S.*, No. 91-70262 (9th Cir.), p. 19:

> "'A fundamental principle of our jurisprudence is that a court will apply the law as it exists when rendering its decision.' *DeGurules v. I.N.S.*, 833 F.2d 861, 863 [(9th Cir. 1987)] ... *City of Great Falls v. U.S.*, 673 F.2d 1065, 1068 (9th Cir. 1982)."

Memorandum of the United States In Opposition to Defendant's Motion to Dismiss, *United States v. Presidio Investments, Ltd.*, CIV-90-0063-TUC-AM (D. Ariz.), p. 12-13:

> "[T]he United States merely asks this Court to honor the well-established principle that 'a court is to apply the law in effect at the time it renders its decision....' *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974). *See also Goida v. Saipan Stevedoring Co.*, 855 F.2d 625, 630-31 (9th Cir. 1988); *DeGurules v. I.N.S.*, 833 F.2d 861, 863 (9th Cir. 1987); *State of Idaho v. Howmat Turbine Co.*, 814 F.2d 1376, 1378 (9th Cir. 1987); *Campbell v. United States*, 809 F.2d 563, 575 (9th Cir. 1987)."

December 1991 a Ninth Circuit endorsement of *Bradley*,[40] and then filed a third brief arguing to the contrary that the Circuit has "expressed no preference between *Bradley* and *Bowen*."[41] Thus within the space of eight months the Department of Justice has filed two briefs in the Ninth Circuit, first expressly approving, and then expressly disapproving, the *Bradley* presumption; the same government attorney is listed as the lead attorney on both of these briefs.[42]

The important inter-circuit conflict described above would be sufficient by itself to warrant a grant of certiorari. Lawyers for the Department of Justice have seized upon the uncertainty in this area of the law to arguing aggressively on

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[40]*Federal Deposit Ins. Corp. v. New Hampshire Insurance Co.*, 1991 U.S. App. LEXIS 30071 (9th Cir. 1991).

[41]Reply Brief for Appellant, *Reynolds v. Martin*, No. 91-15237 (9th Cir.), p. 17 n.6.

[42]This occurred in the Justice Department briefs in *Ayala-Chavez v. I.N.S.* (May 1991; endorsing *Bradley* presumption) and *Reynolds v. Martin* (February 1992; opposing *Bradley* presumption).

both sides of the issue, depending on whether endorsing or repudiating *Bradley* will result in the preferred outcome. Although this litigation tactic may in any given case serve the short term interests of the government, it poses an unreasonable burden on the federal judiciary. Ordinarily the lower federal courts might look to the Department of Justice for principled guidance in a confused and important area of the law. In this instance, however, the inconsistent positions taken by the government in the courts below is necessarily aggravating and exploiting the already serious conflicts among the circuit courts.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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3/31/92

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Supreme Court, U.S.
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NO. 91-1075

IN THE SUPREME COURT
OF
THE UNITED STATES OF AMERICA

OCTOBER TERM 1991

GEORGE LEWIS BAILES, JR.,
PETITIONER,
VS.
UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S RESPONSE TO MEMORANDUM FOR THE UNITED STATES

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ORIGINAL QUESTION FOR REVIEW

WHETHER A CONGRESSIONAL STATUTE THAT IS SILENT AS TO CONGRESSIONAL INTENT FOR ITS RETROACTIVE APPLICATION SHOULD BE PRESUMED TO HAVE RETROACTIVE EFFECT.

NEW AND ADDITIONAL QUESTION FOR REVIEW RAISED BY THE UNITED STATES

WHETHER THE UNITED STATES' DECISION NOT TO PURSUE ITS CLAIM FOR RELIEF FOR "DOUBLE DAMAGES" CAUSES THE INSTANT CASE TO BE MOOT.

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STATEMENT OF FACTS

The statement of facts are contained within Petitioner's original petition. Petitioner reincorporates and adopts same as if fully set forth herein.

ARGUMENT

WHETHER THE UNITED STATES' DECISION NOT TO PURSUE ITS CLAIM FOR RELIEF FOR "DOUBLE DAMAGES" CAUSES THE INSTANT CASE TO BE MOOT.

The instant case and petition are not moot. Should the United States abandon all of its claims against the petitioner, then petitioner would certainly join with the respondent and agree that the case is moot. But the United States has not unambiguously abandoned all of its claims against the petitioner under the statute.

A. The United States has not clearly abandoned its claim for relief under the statute.

The United States sought and obtained relief in the District Court, not only for double damages, but for "costs relating to this action including but not limited to reasonable attorney and auditing fees." After entering a double damage award for the United States, the District Court directed that costs "other than taxable costs" would be determined later. (Pet. App. C-XXIII).

At this very moment there is still pending in the District Court a motion by the United States for Attorney's fees, which motion was filed after the Eleventh Circuit affirmed the District Court's opinion applying retroactively the statute in question. A copy of that motion is attached hereto. All that the United States has definitively abandoned is its claim for double damages: "The United States has determined not to pursue its claim for relief for double

damages under the new statute." (mem. for the United States, p.4).

There remains a live case and controversy over the award of attorney's fees and other costs and expenses, the claim for which is valid only if the statute in question is given retroactive effect. This issue, left unresolved by the United States' concession, is identical to the issue presented to the Court in Bradley v. School Board of Richmond, 416 US 696 (1974), a case that the Eleventh Circuit believes to be controlling on the issue of statutory retroactivity.

B. The United States has not disavowed the precedent that it set in the Eleventh Circuit.

The United States has done nothing to disavow the precedent that it has left in the Eleventh Circuit, and should the United States "discover" some "new" pre-statute violation of one of the petitioner's other apartment complexes, the Alabama District Court hearing the

case will be bound by the authority in the Eleventh Circuit that the United States may or may not be forsaking. In this import, the concession of the United States really does absolutely nothing to moot the controversy between the parties as to whether the statute does indeed apply retroactively.

Likewise, if upon remand the United States attempts to claim the advantages of the statute by claiming that the statute is merely an addendum to the regulatory agreement, the concession offered by the United States does nothing to moot the controversy between the parties. In brief in the Court below, the United States argued:

> Paragraph 14 of the regulatory agreements...is explicitly and purposely open-ended, permitting HUD to..."[a]pply to any court...for such other relief as may be appropriate...." ...[T]he Regulatory agreements give HUD the explicit right to seek any remedy against Bailes that will best effectuate the purposes of the program...."

(See appellate brief of the United States at p. 32.) And more pointedly, the United States

argued in that same brief: "But it is well established that all contracts with the government are subject to subsequent legislation by Congress." (see Id. at 35). A failure to resolve this issue in the instant petition will leave the United States "free to return to [its] old ways." United States v. W.T. Grant, 345 U.S. 629, 632 (1953).

C. The United States should be precluded from pursuing relief other than initially requested.

The Government's failure to take a cross petition from the decision of the Court below collaterally estops the government from initiating a new proceeding based on the same underlying dispute. The United States is seeking to avoid a final decision on the merits of two courts, decisions for which it successfully fought, only so it can go back to the District Court and litigate matters that should have been litigated initially.

Lastly, even if all claims and controversies between the parties regarding the statute were moot, the remand order proposed by the United States is indefensible. The government proposes that the District Court on remand be ordered to "allow the government to seek additional recovery pursuant to its other claims for relief," (Mem. for U.S., p. 4)., and be ordered to vacate only half of the judgment entered in the Court below. In all respects, that judgment would be final and never appealable.

Petitioner has expended substantial legal costs that such litigation entails defending this case, and the expense will have been needless in all respects. Your petitioner continues to have a clear and substantial financial interest in a determination that the 1988 Act cannot be applied retroactively, and continues to share an interest common to (most) all litigants that at some point, litigation come to an end.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision rendered by the United States Court of Appeals for the Eleventh Circuit.

RESPECTFULLY SUBMITTED,

ROY M. WEST
ATTORNEY OF RECORD

RALPH J. BOLEN, ESQ.,
ATTORNEY FOR PETITIONER

A P P E N D I X

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)
v.	) CIVIL) ACTION #) CV-89-P) 0794-S
PEPPERTREE APARTMENT, ET. AL, Defendant.	)

MOTION FOR ATTORNEY'S FEES AND COSTS

Comes now the United States of America, by and through its counsel, Frank W. Donaldson, United States Attorney, for the Northern District of Alabama, and Linda S. Trippe, Assistant United States Attorney, for this district, and moves the Court to enter an order granting to plaintiff the reasonable value of attorney time utilized in the prosecution of the above action and costs pursuant to 12

U.S.C. § 1715z-4a(c). A judgment affirming the district court's decision was entered September 30, 1991. Specifically, plaintiff requests reimbursement for 105.2 hours of attorney time utilized in the prosecution of this case at both the district court and appellate level at a rate of $75.00 per hour for a total of $7,890.00 plus $45.90 mileage. Plaintiff offers herewith the declaration of Geoffry L. Patton, Trial Attorney, Office of General Counsel, United States Department of Housing and Urban Development, Washington, D.C., and the affidavit of Robert P. Barclift, Assistant United States Attorney for the Northern District of Alabama, as Exhibits A and B to this motion.

Respectfully submitted,

FRANK W. DONALDSON

United States Attorney

LINDA S. TRIPPE